

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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Danville, Kentucky 40422
May 24, 1985

The Honorable Edward T. Gignoux
Judge
United States District Court
Post Office Box 8 DTS
Portland, Maine 04112

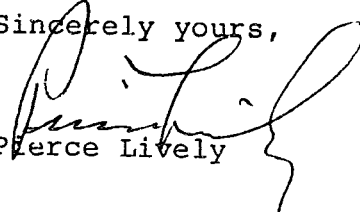
Dear Ed:

Please find enclosed the "Gap Report" of the Advisory Committee on Appellate Rules setting forth a summary of the comments we received on the proposed rule changes and the action taken by the Committee in response thereto at its meeting on April 23, 1985.

Both Ken Ripple and I will be at the meeting of the Standing Committee on June 10th.

With best regards, I am

Sincerely yours,


Pierce Lively

Report of the Advisory Committee on the Federal Appellate Rules After Consideration of the Comments of the Bench and Bar on the Preliminary Drafts of Proposed Amendments to the Federal Rules of Appellate Procedure.

On April 23, 1985, the Advisory Committee on the Federal Appellate Rules met in Washington, D.C. to consider the comments of the bench and bar on the preliminary drafts of amendments to the Federal Rules of Appellate Procedure which had been submitted for public comment on September 6, 1984.

The Advisory Committee considered the statements made at the public hearings conducted in Washington, D.C. on February 1, 1985 and in San Francisco, California on February 21, 1985 as well as the written statements submitted by interested individuals and groups. The following paragraphs present a summary of those statements and the Advisory Committee's recommendation with respect to each preliminary draft.

Rule 3.1

A. Summary of Public Comment

The Association of the Bar of the City of New York, Committee on Federal Courts, suggests that the word "consent" be used in place of "stipulate" (line 1) and "agree" (line 5) in order to conform the language of the rule to 28 U.S.C. § 636(c)(1) and (c)(3). The Association also suggests a comma

after "district court" (line 6) and to change "and thereafter" in line 6 to "which is thereafter reviewable."

The Board of Trustees of the Los Angeles County Bar Association and the Philadelphia Bar Association note their agreement with the preliminary draft.

B. Advisory Committee Recommendations

The Advisory Committee, after reviewing the comments of the bench and bar, recommends the following changes in the language of the preliminary draft:

line 1 - Change "stipulate" to "consent."

line 5 - Change "stipulate" to "consent."

This change conforms the language of the rule to the precise language of the statute.

Rule 5.1

A. Summary of Public Comment

While several bar associations approved of the preliminary draft, the majority of the commentators suggested that the seven day period for the filing of an answer in opposition was too short. One commentator also suggested that specific allowance for cross petitions be made.

B. Advisory Committee Recommendations

The Advisory Committee, after reviewing the comments of the bench and bar, recommends the following changes in the language of the preliminary draft:

line 1 - Change "The" to "An."

This change is purely stylistic.

line 11 - Change "seven" to "14."

This change is prompted by the concern of several who submitted statements that 7 days was too short a period. The change to arabic numbers is purely stylistic.

line 12 - Add: "or cross-petition."

This change, also suggested by a comment from the bar, will ensure that, once a petition is filed, other parties may suggest other reasons for further review of the case by the court of appeals.

line 26 - Change "ten" to "10."

This change is purely stylistic.

Rule 15.1

A. Summary of Public Comment

Only one comment was received on this proposed rule. The Philadelphia Bar Association recommends against adoption unless the rule is expanded to include enforcement proceedings other than those brought by the NLRB.

B. Advisory Committee Recommendations

The Advisory Committee recommends no changes in the language of the preliminary draft.

Rule 19

A. Summary of Public Comment

The Association of the Bar of the City of New York suggests the elimination of the language "or denied

completely such enforcement" in the Committee Note. It suggests the following language be added:

"The simpler procedures permitted by this change already are applicable when the court's opinion denies completely the enforcement of an agency's order."

Several other bar associations and the Ninth Circuit Advisory Committee indicated their agreement with the preliminary draft or stated that they had no objection.

B. Advisory Committee Recommendations

The Advisory Committee recommends no changes in the language of the preliminary draft or of the Committee Note.

Rule 28

A. Summary of Public Comment

Several commentaries expressed approval of the preliminary draft. The Ninth Circuit Advisory Committee suggested that the new rule be limited to briefs over 3-4 pages. The Los Angeles Chapter of the Federal Bar Association suggests that the draft read:

"The reply briefs shall conform to the requirements of subdivision (a)(1)."

B. Advisory Committee Recommendations

The Advisory Committee recommends no changes in the language of the preliminary draft. The matters raised by the comments of the bench and bar were considered prior to the

circulation of the preliminary draft. The Advisory Committee believes that the rule should provide the practitioner with guidance without reference to another subsection. It also believes that the requirement should extend to all reply briefs regardless of their length.

Rule 30(a)

A. Summary of Public Comment

Several commentators expressed agreement with the preliminary draft. The Joint Federal Courts Committee of the Bar Association of San Francisco suggested that the rule, and not just the Committee Note, should state that only pertinent sections of memoranda should be included.

B. Advisory Committee Recommendations

The Advisory Committee recommends no changes in the language of the preliminary draft.

Rule 30(b)

A. Summary of Public Comment

This preliminary draft has been opposed by all those who did comment on it. The objections can be summarized as follows:

1. Present mechanisms for the allocation of costs provide adequate sanctions.
2. Courts already have the power to sanction attorneys acting in bad faith.

3. The preliminary draft fails to specify criteria for bad faith and fails to require use of procedural safeguards before imposition of sanctions.

4. Imposition of sanctions would be expensive and time consuming.

5. The preliminary draft amendment deals with only a small portion of the frivolous appeal problem.

6. Education of the bar would be the more appropriate approach.

B. Advisory Committee Recommendations

The Advisory Committee recommends no change to the preliminary draft. On the basis of its study of the practice under Rule 30, as set forth in the report submitted to this Committee in July 1984, the Advisory Committee believes that the preliminary draft is an appropriate response. It recommends the following addition to the Committee note:

"The local rule shall provide for notice and opportunity to respond before imposition of any sanction."

Rule 39(c)

A. Summary of Public Comment

The board of Trustees of the Los Angeles County Bar Association expressed "no major opposition" to the preliminary draft. The Association of the Bar of the City of New York expressed doubt as to the proposed rule's efficacy. The Philadelphia Bar Association recommends against adoption

on the ground that the rule will not reduce the overall cost of litigation. John L. Warden, Esquire of the New York bar suggests that the rule specifically permit standard typographic printing.

B. Advisory Committee Recommendations

The Advisory Committee recommends no changes in the preliminary draft.

Rule 45

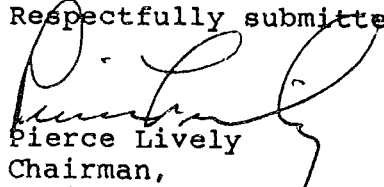
A. Summary of Public Comment

Several commentators expressed approval of or no opposition to the preliminary draft. The Joint Federal Courts Committee of the Bar Association of San Francisco recommends clarification to assure that the clerk of court enter a record of all papers filed in the clerk's office and that these papers remain available to the public.

B. Advisory Committee Recommendations

The Committee recommends no changes in the preliminary draft. The suggestion set forth above is not within the scope of the rule and, in the opinion of the Advisory Committee, unnecessary.

Respectfully submitted,


Pierce Lively
Chairman,
Advisory Committee on the
Federal Appellate Rules

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